

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP1525-CR

Cir. Ct. No. 2016CF51

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL J. POPPLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Iowa County:
WILLIAM A. SHARP, Judge. *Affirmed.*

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Michael J. Popple appeals a judgment that convicted him of a second or subsequent offense of manufacturing 1000-2500

grams of THC. The sole issue on appeal is whether the circuit court erred in denying Popple's motion to suppress evidence that had been seized pursuant to a warrantless search. We conclude that the circuit court properly determined that the challenged evidence was admissible under the community caretaker exception. Accordingly, we affirm the judgment of conviction.

BACKGROUND

¶2 On the evening of October 27, 2015, Popple's daughter, Brittany, discovered him unresponsive in his living room and had a friend call 911. Officer Joshua Rider, who at that time worked for the City of Dodgeville Police Department, received a dispatch stemming from the 911 call at about 10:30 p.m., and was the first responder on the scene at about 10:33 p.m. Rider checked Popple's pulse and respiration, and attempted to administer first aid until emergency medical service personnel arrived shortly thereafter, at about 10:35 p.m. Officer Max Hofkes, also from the City of Dodgeville Police Department, arrived about the same time as the medical personnel.

¶3 Roughly ten to fifteen minutes later, after the medical personnel stabilized Popple and took him to the hospital by ambulance, Rider performed a protective sweep of the upper level and then questioned Brittany, Brittany's friend William Knight, and Knight's sister Rachel Knight.¹ Rider testified that he did not search the basement when he searched the main level because he did not want to leave the occupants of the house alone upstairs.

¹ To avoid confusion among people with the same last name, we will refer to Michael Popple's daughter and the Knight siblings by their first names.

¶4 The Knight siblings had come over to the house in response to a frantic call from Brittany about her father. William and Rachel told the police that they had arrived shortly before Rider, and that Popple's girlfriend Jana Lengyel was also in the house at that time, but that Lengyel had fled out the back door when she saw Rider's lights because she and Popple were not supposed to have contact with one another as conditions of probation.

¶5 Brittany was initially hesitant to tell Rider that Lengyel had been present at the time of the overdose because she was aware of the no-contact provision. Rider was also aware that Lengyel had a prior drug conviction, and that Brittany had, on a previous occasion, lied about Lengyel's presence in the house to protect her and/or Popple from the consequences of having violated the no contact provisions. However, when questioned separately by Hofkes, Brittany confirmed the information given by William and Rachel. Although Hofkes did not testify at the suppression hearing, the State introduced a recording that Hofkes had made of interviews he conducted with Brittany and Rachel outside of the house at or about the same time that Officer Rider was questioning William inside of the house.²

¶6 None of the occupants of the house was able to tell Rider or Hofkes what substance Popple had overdosed on. Nor was Officer Rider able to find any indication of what substance may have affected Popple when he searched the main

² The DVD of the interviews was marked as an exhibit at the suppression hearing but is not included in the appellate record. Nonetheless, we can make reasonable inferences about the interviews conducted by Officer Hofkes based upon the testimony of William Knight as to what he told Officer Hofkes and the testimony of the other officers as to what Officer Hofkes related to them. Popple waived any objection to the admission of the DVD because he viewed the interviews as favorable to the defense for evidence suppression purposes.

floor. Rider did not immediately search the lower level of the house because he did not want to leave the occupants alone upstairs.

¶7 At about 11:00 p.m., Hofkes called a drug task force member, Officer Jerron Wetter, to come investigate any potential drug offenses related to the overdose. Officer Wetter arrived at Popple's house about fifteen minutes later, at 11:15 p.m. At that time, Hofkes was outside with Rachel, and Rider was inside with Brittany and William.

¶8 After asking Brittany whether she knew what her father had overdosed on and whether there was anyone else in the house, Wetter asked Rider whether Rider had searched the basement for any other people or potential overdose victims. When Rider informed Wetter that he had not searched the basement, Wetter asked Hofkes to perform a protective sweep of the basement with him, which they executed with guns drawn. During the search of the basement, Wetter and Hofkes observed a large amount of marijuana in a processing stage. They then returned upstairs and applied for a search warrant.

STANDARD OF REVIEW

¶9 When reviewing a motion to suppress evidence, we will uphold the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); *State v. Hindsley*, 2000 WI App 130, ¶22, 237 Wis. 2d 358, 614 N.W.2d 48. However, we will independently determine whether the facts found by the circuit court satisfy applicable constitutional provisions. *Hindsley*, 237 Wis. 2d 358, ¶22.

DISCUSSION

¶10 The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution protect the right to be free from unreasonable searches. *State v. Dearborn*, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. A warrantless search is per se unreasonable unless it falls within a clearly delineated exception. *State v. Artic*, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430.

¶11 One such exception is that “a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures.” *State v. Pinkard*, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592. An officer’s community caretaker function is distinct from the officer’s law enforcement function—that is, the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *State v. Matalonis*, 2016 WI 7, ¶30, 366 Wis. 2d 443, 875 N.W.2d 567.

When a community caretaker function is asserted as the basis for a home entry, the circuit court must determine: (1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home. The State bears the burden of [proving that these factors have been met].

Pinkard, 327 Wis. 2d 346, ¶29.

¶12 A determination that an officer engaged in a bona fide community caretaker function requires an objectively reasonable basis to believe that there was a member of the public who was in need of assistance. *State v. Maddix*, 2013 WI App 64, ¶20, 348 Wis. 2d 179, 831 N.W.2d 778. When an objectively

reasonable basis for the community caretaker function is shown, that determination is not negated by a law enforcement officer's subjective law enforcement concerns, although a court assessing whether an officer acted for a bona fide community caretaker purpose may consider the officer's subjective intent. *See State v. Kramer*, 2009 WI 14, ¶30, 315 Wis. 2d 414, 759 N.W.2d 598; *State v. Asboth*, 2017 WI 76, ¶15, 376 Wis. 2d 644, 898 N.W.2d 541.

¶13 The balancing test requires an objective analysis of the reasonableness of the police conduct in light of factors such as the degree of public interest involved and the urgency of the situation facing the officers; the circumstances surrounding the search, including the time, location, degree of force or authority employed; whether there was a diminished expectation of privacy because the search or seizure occurred in a vehicle; and the availability and feasibility of less intrusive alternatives. *Pinkard*, 327 Wis. 2d 346, ¶42.

¶14 Here, there is no dispute between the parties that the search of the basement constituted a Fourth Amendment event. Therefore, we need only address whether the officers were engaged in a bona fide community caretaker function when they conducted the search and, if so, whether the search represented a reasonable balancing of interests under the totality of the circumstances.

Bona Fide Community Caretaker Function

¶15 The circuit court determined that the police had an objectively reasonable basis to believe that there might be someone in need of assistance in the basement “based upon reasonable inferences [that could be drawn] from the situation.” Popple argues that inferences alone are insufficient to establish the requisite grounds to exercise a community caretaker function, absent any direct observations made by police or specific information provided to them that would

suggest there might be someone in need of assistance. Popple points out that, in *Maddix*, this court determined that police officers' subjective belief that residents in an apartment to which the police had been called to investigate a domestic disturbance were lying about whether there was anyone else in the apartment did not provide a objectively reasonable basis to believe that there was anyone else in need of assistance in the apartment, absent any other evidence that corroborated the officers' theory that there might be another victim. *Maddix*, 348 Wis. 2d 179, ¶27.

¶16 We are persuaded, however, that the inferences that could be made here were stronger than those available in *Maddix*. First, the nature of an overdose situation generally differs from that of a domestic violence situation. As the circuit court aptly observed:

So addicts tend to be friends with addicts.... They shoot up together. They overdose, potentially, together. So there's the very real danger that where you have one person overdosing, you can have more than one person overdosing.

More specifically here, the police had information that another person with a history of drug use had been in the house at the time that Popple overdosed. It was therefore reasonable to infer that Popple's girlfriend may have been doing drugs with Popple and could also be at risk of an overdose if the drugs used had been particularly potent. It was further reasonable to infer, given the no contact order and the daughter's past history of lying to protect her father and his girlfriend, that the girlfriend may have gone to hide in the basement when the police arrived, and that the daughter and her friends may have lied about it.

¶17 In addition, we note that Popple was found unresponsive on the main floor of his residence, but there was no drug paraphernalia found near him and

none of the other people present when the police arrived could provide information about how Popple had overdosed. We see only two reasonable inferences that could be drawn to explain the lack of drug paraphernalia on the main floor. Either someone such as Popple's girlfriend had removed any evidence of drugs from the scene, or Popple had not been on the main floor when he ingested the drugs. If Popple had overdosed somewhere other than where he was found unresponsive, the basement was the most likely place that would have occurred. And if Popple had ingested drugs in the basement before coming upstairs and collapsing, it was objectively reasonable to consider the possibility that there could be another overdose victim in the basement, whether the girlfriend or a third party. We conclude, as did the circuit court, that the police were engaged in a bona fide community caretaker function when they searched the basement.

¶18 The fact that the officers conducting the search may also have had law enforcement concerns does not negate the fact that they wanted to make sure there were no other victims.

Balancing of Interests

¶19 We turn next to the balancing test. As to the first factor, the public plainly has a strong interest in preventing overdose deaths. Because time can be crucial in overdose situations, there was urgency to the officers' need to check for any other victims. We acknowledge that waiting forty-five minutes before conducting the search of the basement could undermine the urgency argument to some degree. However, during that time, the officers were engaged, first, in rendering aid to Popple before the EMTs arrived, and then in interviewing the other occupants of the house to determine what Popple had taken, which could

also have affected Popple's care. Given the logistics of interviewing the witnesses separately, it was not unreasonable for the first two officers on scene to wait for an additional officer to arrive before conducting the search of the basement.

¶20 As to the second factor, the police did not choose the time or place of the initial entry into Popple's home; rather, they were responding to a 911 call. As we have explained above, the timing of the subsequent search of the basement was dictated by the need to interview the occupants of the house about what Popple had overdosed on. The police did exhibit some degree of law enforcement authority by drawing their weapons while they searched the basement, consistent with a protective sweep. However, the fact that the officers had a dual concern for their own safety does not negate the fact that one of their purposes in searching the basement was to exercise the bona fide community caretaker function of checking to make sure there were no additional victims in the lower level.

¶21 As to the third factor, the warrantless entry into a home is more suspect and subject to stricter scrutiny than the search of a motor vehicle. *State v. Ultsch*, 2011 WI App 17, ¶18, 331 Wis. 2d 242, 793 N.W.2d 505. Because the search at issue here did not take place in an automobile, there was no diminished expectation of privacy.

¶22 Finally, there appear to have been limited alternative options to searching the basement upon the arrival of the third officer: either searching earlier while leaving the occupants of the house alone or under the supervision of a single officer on the main floor, or taking the word of the occupants that there was no one in the basement. We have already explained why it was reasonable for the officers to interview the occupants of the house before conducting the search of the basement. We further observe that the officers were not required to accept the

word of the occupants, particularly given that the daughter had previously lied to the police about the girlfriend's presence in the home.

¶23 Balancing all of these factors, we are satisfied that it was reasonable to search the basement of the house without a warrant to check for any additional overdose victims, even given the heightened privacy interest against intrusions into the home. We conclude that the circuit court properly denied Popple's suppression motion.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2015-16).

